

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S  
APPENDIX**



# 74-1451

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1451

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UNITED STATES OF AMERICA,

*Appellee,*

*—against—*

JOHN MATTHEW BOSTON and  
ERNEST MOORE,

*Appellants.*

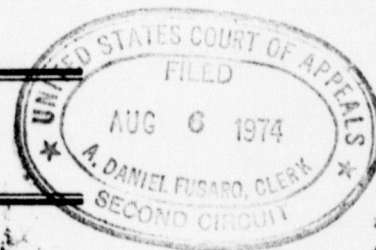
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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### GOVERNMENT'S APPENDIX

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DAVID G. TRAGER,  
*United States Attorney,  
Eastern District of New York,  
Attorney for Appellee.*

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A 1

UNITED STATES DISTRICT COURT  
Eastern District of New York  
71-CR-682  
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The United States of America

against

John Mathew Boston a/k/a "Sam Boston  
and Ernest Moore

Defendants  
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United States Court House  
Brooklyn, N.Y.

January 22, 1974

Before: Honorable Mark A. Constantino, U.S.D.J.

Appearances:

Edward J. Boyd, Esq.  
United States Attorney for the Eastern District  
of New York  
By: Stephen Behar, Esq., Assistant United States  
Attorney

David W. McCarthy, Esq.  
Attorney for the Defendant Boston

Gustave Weiss, Esq.,  
Attorney for the Defendant Moore

THE COURT: The Court is now ready to 946

render its decision on which it had reserved decision on the matters of the suppression hearing on the various dates that you are all familiar with.

The first portion of the decision deals with the physical evidence obtained by federal agents during a raid on Apartment 3-C at 441 Alabama Avenue.

It is settled that warrantless searches are per se unreasonable in the absence of exigent circumstances. The Government seeks to uphold the validity of the seizure of certain documents from Apartment 3-C on Alabama Avenue by using the "plain view" exception to the warrant requirement. The Court holds, however, that the "plain view" exception is inapplicable to the situation here.

Firstly, no exigent circumstances have been shown. The agents were in full possession of the premises and had sufficient time to obtain a search warrant if they deemed it necessary.

Secondly, the plain view doctrine should never be used to, "extend a general exploratory search from one object to another until something incriminating at last emerges."

The doctrine justifies seizures, "only where it is immediately apparent to the police that they have

1 the evidence before them." Coolidge vs. New Hampshire,  
2 403 U.S. 443, 446 (1971).

3 In this case the agents only had an arrest war-  
4 rant and a tip that a suspect lived there. Consequently  
5 the forced entry into a three-room apartment, and the  
6 five-minute search to find whether anyone was there do  
7 not justify the seizure of the sales contract and the  
8 rent receipt. The circumstances surrounding the seizure  
9 clearly do not bring this case within the ambit of the  
10 "plain-view doctrine." The evidence seized at the  
11 Alabama Avenue apartment was illegally obtained and  
12 therefore must be suppressed.

13 Statements of Ernest Moore obtained by FBI  
14 agents during a pre-arrangement interrogation.

15 On July 13, 1972, in the early evening Defendant  
16 Moore was arrested by New York City police on charges  
17 of bank robbery. Moore had been previously indicted by  
18 a Federal Grand Jury in June of 1971 for another bank  
19 robbery. On July 14th Moore was arraigned on the state  
20 charge at Kings County Criminal Court in Brooklyn at  
21 which time he had an attorney.

22 Special Agent Jones of the FBI was notified that  
23 Moore had been arrested and at around 2 p.m. placed him  
24 in federal custody and drove him to FBI headquarters  
25 in Manhattan where he was questioned, fingerprinted and

1 photographed until about 6:20 p.m. Prior to the 948  
2 questioning Jones knew of the indictment pending against  
3 Moore and that Moore had an attorney in the state  
4 robbery charge. However, he did not inform Moore of the  
5 indictment. He gave Moore the Miranda warnings several  
6 times and succeeded in getting Moore to sign a Miranda  
7 waiver form.

8 During the questioning, Moore was confronted with  
9 the sales contract and rental receipt which had been  
10 seized from the apartment on Alabama Avenue earlier.

11 The Government contends that the statements are  
12 admissible because Moore voluntarily and knowingly  
13 waived his rights.

14 Based upon evidence which showed that the  
15 Government used illegally obtained evidence to c o n-  
16 front Moore, that Moore was never apprised of the  
17 indictment pending against him and there could not have  
18 knowingly and intentionally waived his right, and the  
19 totality of circumstances under which Moore was detained  
20 and questioned by the FBI, the Court suppresses all  
21 statements made by Moore at the FBI interview on July  
22 19, 1972.

23 Citing United States ex rel. Lopez vs. Zelker,  
24 342 Fed. Supp. 1050, Southern District of New York,  
25 1972. See also Massiah vs. United States, 377 United

1 States 201 (1964) and United States vs. Garcia, 949  
2 377 Fed. 2d 321, 324, Second Circuit 1967.

3 Warrantless arrest June 3, 1971, John Boston.

4 By questioning the validity of his warrantless  
5 arrest the issue arises as to whether the FBI agents  
6 had sufficient information, independent of any state-  
7 ments made by an unnamed informant, to believe that  
8 Defendant Boston had committed the bank robbery under  
9 investigation.

10 The Court finds that the arresting officer had  
11 required probable cause to arrest Boston. This decision  
12 is based upon the physical descriptions of the robbers  
13 that the arresting agents had been given, the fact that  
14 the agents had been given a description of the getaway  
15 car and its license number, the peculiar and suspicious  
16 conduct of defendant and another person observed by  
17 the agents, and the fact that the defendant gave false  
18 identification to the agents upon being questioned.

19 Items seized during June 3, 1971 arrest, John  
20 Boston: The defendant contends that all evidence  
21 seized after the arrest should be suppressed solely  
22 because the arrest was made without probable cause.  
23 The Court, however, has held that the arresting agents  
24 had sufficient probable cause to arrest Boston.

25 Therefore, defendant's motion to suppress evidence

1 seized is denied.

2 Items seized at 1212 Loring Avenue: On June 3,  
3 1971, a warrantless search of the premises at 1212  
4 Loring Avenue, Brooklyn, New York, was conducted by  
5 approximately six FBI agents. The Government reasons  
6 that the warrantless search of the apartment was valid  
7 because of the consent of Stephanie Baker, tenant of the  
8 apartment.

9 Based upon the testimony and the demeanor of the  
10 witnesses, the Court finds that Stephanie Baker knowing-  
11 ly, intentionally and voluntarily consented to the  
12 search of her apartment.

13 The agents testified that they had informed her  
14 of her rights before the search and that she by both  
15 oral and written statements gave her consent.

16 Defendant's motion to suppress is denied.

17 Statements given by John Boston to FBI Agent Jones  
18 and Assistant United States Attorney Accetta: Defendant  
19 based this motion on two grounds.

20 One, that he was not apprised of his Miranda  
21 rights prior to making any statements.

22 Two, that statements made by him were the immed-  
23 iate result of the illegal search conducted at the 1212  
24 Loring Avenue location.

25 In view of the Court's finding that the warrantless

1 search was valid, defendant's second ground is 951  
2 untenable.

3 As for the Miranda rights objection, the Court  
4 finds, on the basis of the demeanor of the witnesses and  
5 the testimony adduced that defendant Boston had been  
6 properly advised of his Miranda rights.

7 Accordingly, defendant's motion is denied.

8 Identifications: The defendants seek to suppress  
9 the photographic identification of them by three bank  
10 employees, Joseph Dente, John Jackson and George  
11 Intellisano. Defendant Boston's picture was identified  
12 by all three witnesses approximately three months after  
13 the robbery had occurred. The photograph of Boston  
14 used in the spreads was identical to the one that had  
15 appeared in local papers several days after the robbery  
16 in connection with an article reporting the arrest of  
17 two of the bank robberies and the recovery of \$80,000.

18 Defendant Moore's photograph was identified  
19 approximately eight months after the robbery. The  
20 spread of pictures shown to Mr. Dente contained  
21 several pictures that had been previously included in  
22 the spread used for the identification of defendant  
23 Boston.

24 Based upon the testimony and all the other  
25 evidence in the record, the Court finds that the photo-

1 graphic identifications were not so impermissibly 952  
2 suggestive as to give rise to a substantial likelihood  
3 of mis-identification, Neil vs. Biggars; United States  
4 ex rel. Gonzalez vs. Zelker.

5 All the witnesses testified that they were able  
6 to observe the defendants during the commission of the  
7 robbery for some five to eight minutes. No masks or  
8 disguises were used by the robbers.

9 Boston's photographic identification occurred  
10 three months after the robbery. Each of the witnesses  
11 was certain of his identification of Boston.

12 Moore's photographic identification occurred  
13 eight months after the crime. The identification pro-  
14 cedure was not suggestive and the witnesses were  
15 sufficiently certain of their identification.

16 Those are the Court's rulings. Since there are  
17 four or five different phases with respect to the  
18 testimony given, the Court will give you ample oppor-  
19 tunity to review its determination and sets the jury  
20 selection down for 3 o'clock.

21 MR. MCCARTHY: I would ask the Court to peruse  
22 the Grand Jury testimony with regard to this case,  
23 based upon United States vs. Estepa, to determine  
24 whether or not the Government properly apprised the  
25 Grand Jury that the sole testimony in the Grand Jury was

Stenographer's Transcript

UNITED STATES DISTRICT COURT  
Eastern District of New York  
71-CR-682

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The United States of America

against

John Mathew Boston a/k/a "Sam Boston"  
and Ernest Moore

Defendants  
-----

United States Court House  
Brooklyn, N.Y.

January 30, 1974

Before: Honorable Mark A. Costantino, U.S.D.J.

Appearance:

Edward J. Boyd, Esq.  
United States Attorney for the Eastern District  
of New York  
By: Stephen Behar, Esq.  
Assistant United States Attorney

David W. McCarthy, Esq.  
Attorney for Defendant Boston

Gustave Weiss, Esq..  
Attorney for Defendant Moore

A 10

THE COURT: All right, bring the jury in.

(The jury took its place in the jury box.)

THE COURT: Madame Forelady, and ladies  
and gentlemen of the jury:

We now come to the final stage of the  
proceedings. The Court will now charge you on the  
law to be applied to the facts in the case.

As you may recall, I initially gave you a  
precharge as to the manner in which the case  
would be presented to you. I told you that most  
of the evidence in the case would come in the form of the  
testimony of witnesses, and that you were to pay  
special attention to the manner in which the witnesses  
testified.

I believe I also instructed you that you  
would be the judges of the facts in the case, that  
being your sole province; and that your recollection  
of the facts after having heard all of the evidence  
in the case -- the testimony of witnesses and the  
documentary proof -- was to control the determination  
of the issues.

Likewise, at that time, I told you that I  
would be the judge of the law. This has not changed  
at this stage of the proceedings. I will not  
review the facts in this case for you because I am

EK/td  
4/2

## Charge of the Court

1  
2 certain that with summations by the attorneys,  
3 there is no need for the Court to review the facts.

4 In any event, if you find that there is some  
5 fact in the case that you may have forgotten or  
6 don't recollect, or you can't agree with each other  
7 in your deliberations, you can have it read back  
8 from the record, and that will, I am sure, refresh  
9 your memory.

10 In any event, I am the judge of the law. You  
11 must accept what I say to be the law in the case.

12 Now, the attorneys have been permitted by  
13 the Court and by the rules to make opening statements  
14 and summations to you. Under no circumstances, are  
15 the statements they have made by way of opening or  
16 by way of summation, to be taken as evidence.  
17 However, the Court and the law does permit you to  
18 take the arguments that they have proffered before  
19 you and weigh those arguments. And if you agree with  
20 what they have said on either side of the case, you  
21 may use those arguments in your deliberations and  
22 in discussing the case with each other, and try to  
23 convince one another as to what the final determination  
24 shall be with reference to the deliberations at hand.

25 If you feel that the arguments are not commen-

1  
2 surate with the testimony and the proof in the case,  
3 you may disregard them.

4 The arguments are not evidence. You need not  
5 weigh them. However, there are times when the  
6 arguments of the attorneys will give you an insight  
7 as to something you may have missed, and you may  
8 discuss that portion of it if you so desire.

9 Now, of course, I also said to you that during  
10 the trial, the Court will be the judge of the law.  
11 Likewise, as to motions which at times we had at  
12 a sidebar, as you may recall. That was not for the  
13 purpose of keeping any of the proof from you, they  
14 were matters of law which were discussed between  
15 the attorneys and the Court itself and should not  
16 have come before you.

17 In any event, if you feel that you have  
18 discovered by some stretch of your imagination what  
19 this Court thinks as to either some of the testimony,  
20 or the case itself, you should remove that from your  
21 mind because I tell you here and now I have come to  
22 no conclusion in this case, nor have I indicated to  
23 you in any way whatsoever, what my feeling is with  
24 reference to the facts in the case or with reference  
25 to the guilt or innocence of the defendants.

1  
2 That is your province and your job. You should  
3 not try to weigh what you believe the Court's impress-  
4 ion may be.

5 You must understand that the lawyers who  
6 appear before you are advocates. They are advocating  
7 the best case they can for the people they represent,  
8 and they have a right to exercise as much forcefulness  
9 as they desire in their questioning or otherwise  
10 in presenting their case. I say this because this is  
11 all within the framework of the ordinary trial.

12 Of course, you know by this time that this  
13 case has come before you by way of an indictment  
14 presented by a Grand Jury sitting in this Eastern  
15 District. That indictment charges the defendants  
16 with the counts I shall now read to you.

17 Remember, the indictment is merely an accusation,  
18 merely a piece of paper. It is not evidence and is  
19 not proof of anything.

20 Count 1:

21 "On or about the 2nd day of June 1971,  
22 within the Eastern District of New York, the  
23 defendants JOHN MATTHEW BOSTON, also known  
24 as SAM BOSTON, ERNEST MOORE, also known as  
25 "BILL" and DANIEL EDWARD WASHINGTON, knowingly

1 and wilfully, by force, violence, and intimidation,  
2 did take from the person and presence of employees of  
3 the National Bank of North America, 152-80 Rockaway  
4 Boulevard, Queens, New York approximately One Hundred  
5 Eighty Five Thousand Seven Hundred Eighty Dollars  
6 in United States Currency, which money was in the  
7 care, custody, control, management and possession of  
8 the said bank, the deposits of which bank were then and  
9 there insured by the Federal Deposit Insurance  
10 Corporation."

11 This is charged under Title 18, United States  
12 Code, Section 2113(a) and under Section 2.

13 Now, Section 2113(a) of Title 18 of the United  
14 States Code reads in pertinent part as follows:

15 "Whoever, by force or violence, or by  
16 intimidation, takes, or attempts to take,  
17 from the person or presence of another  
18 any property or money or any other thing  
19 of value belonging to, or in the care,  
20 custody, control, management or possession  
21 of, any bank, credit union, or any savings  
22 and loan association" is guilty of a crime.

23 Count two charges:

24 "On or about the 2nd day of June 1971,  
25

1  
2 within the Eastern District of New York,  
3 the defendants JOHN MATTHEW BOSTON, also  
4 known as Sam Boston, ERNEST MOORE, also  
5 known as "Bill", and DANIEL EDWARD  
6 WASHINGTON, knowingly and wilfully, by  
7 force, violence, and intimidation, did take  
8 from the person and presence of employees  
9 of the National Bank of North America,  
10 152-80 Rockaway Boulevard, Queens, New  
11 York, approximately One Hundred Eight  
12 Five Thousand Seven Hundred Eighty Dollars  
13 in United States currency, which money was  
14 in the care, custody, control, management  
15 and possession of the said National Bank  
16 of North America, the deposits of which  
17 bank were then and there insured by the  
18 Federal Deposit Insurance Corporation and  
19 in commission of this act and offense, the  
20 defendants, JOHN MATTHEW BOSTON, also known  
21 as Sam Boston, ERNEST MOORE, also known  
22 as "Bill", and DANIEL EDWARD WASHINGTON,  
23 did assault and place in jeopardy, the  
24 life of the said bank employees, as well as  
25 the lives of other persons present by the

1  
2 use of a dangerous weapon."

3 That is Title 18, United States Code, Section  
4 2113 (b) and Section 2.

5 Section 2113 (b) of Title 18 of the United  
6 States Code reads in pertinent part as follows:

7 "Whoever in committing, or in attempting,  
8 to commit, any offenses defined in  
9 Subsection (a) of this Section, assaults  
10 any person, or puts in jeopardy the  
11 life of any person by the use of the  
12 dangerous weapon or device" shall be  
13 guilty of a crime.

14 So that those two Sections are separate, one  
15 is the use of the gun, the other is the taking of  
16 the property.

17 Section 2113(f) defines the term "bank" to  
18 mean "any member bank of the Federal Reserve System  
19 ...any banking institution organized or operating  
20 under the laws of the United States, and any bank,  
21 the deposits of which are insured by the Federal  
22 Deposit Insurance Corporation."

23 Both counts of the indictment also refer to  
24 Section 2 of Title 18 of the United States Code, which  
25 reads as follows:

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

"(b) Whoever wilfully causes an act to be done which if directly performed by him or another, would be an offense against the United States, is punishable as a principal."

That is the aiding and abetting Section of the law, Section 2.

The crime charged in Count One of the indictment requires that the Government prove beyond a reasonable doubt:

One. The act or acts of taking from the person or presence of another, money belonging to or in the care, custody, control, management or possession of a bank, as charged; and paragraph two.

The act or acts of taking such money by force or violence, or by means of intimidation; and paragraph three.

That such acts were done by each of the defendants knowingly and wilfully.

1  
2           The crime charged in count two of the  
3 indictment requires that the Government prove beyond  
4 a reasonable doubt:

5           One. The act or acts of assaulting, or of  
6 putting in jeopardy the life of any person by the  
7 use of a dangerous weapon or device, while engaged  
8 in stealing money from the bank as charged; and  
9 paragraph two. That such acts were done by each of  
10 the defendants knowingly and wilfully.

11           (Continued on next page)  
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1  
2 The law recognizes two kinds of possession:  
3 actual possession and constructive possession. A  
4 person who knowingly has direct physical control over  
5 a thing, at a given time, is then in actual possession  
6 of it.

7 A person who, although not in actual possession,  
8 knowingly has both the power and the intention at a  
9 given time to exercise dominion or control over a  
10 thing, either directly or through another person or  
11 persons, is then in constructive possession of it.

12 The law recognizes also that possession may  
13 be sole or joint. If one person alone has actual or  
14 constructive possession of a thing, possession is sole.

15 If two or more persons share actual or  
16 constructive possession of a thing, possession is  
17 joint.

18 If you should find beyond a reasonable doubt  
19 from the evidence in the case that, at the time and  
20 place of the alleged offense, the National Bank of  
21 North America, either alone or jointly with others,  
22 had actual or constructive possession of the money  
23 described in the indictment, then you may find that  
24 such money was in the possession of the National  
25 Bank of North America within the meaning of the word

1  
2 "possession" as used in these instructions.

3 To take, or attempt to take, "by intimidation,"  
4 means willfully to take, or attempt to take, by  
5 putting in fear of bodily harm. Such fear must arise  
6 from the willful conduct of the accused, rather  
7 than from some mere temperamental timidity of the  
8 victim; however, the fear of the victim need not be  
9 so great as to result in terror, panic, or hysteria.

10 A taking, or an attempted taking, "by  
11 intimidation," must be established by proof of one  
12 or more acts or statements of the accused which were  
13 done or made, in such a manner, and under such  
14 circumstances, as would produce in the ordinary  
15 person fear of bodily harm.

16 However, actual fear need not be proved.  
17 Fear, like intent, may be inferred from statements  
18 made and acts done or omitted by the accused, and  
19 by the victim as well; and from all the surrounding  
20 circumstances shown by the evidence in the case.

21 If the jury should find beyond a reasonable  
22 doubt from the evidence in the case that the accused  
23 did willfully commit robbery of the bank, as charged,  
24 then the jury must proceed to determine whether  
25 the evidence in the case establishes that the

1  
2 accused, in committing robbery of the bank, assaulted  
3 or put in jeopardy the lives of several of the  
4 employees of the bank, as charged in the indictment.

5 Any willful attempt or threat to inflict  
6 injury upon the person of another, when coupled with  
7 an apparent present ability to do so, or any  
8 intentional display of force such as would give the  
9 victim reason to fear or expect immediate bodily harm,  
10 constitutes an assault. An assault may be committed  
11 without actually touching, or striking, or doing  
12 bodily harm to the person of another.

13 So, a person who has the apparent present  
14 ability to inflict bodily harm or injury upon another  
15 person, and willfully attempts or even threatens to  
16 inflict such bodily harm, as by intentionally  
17 flourishing or pointing a pistol or gun at another  
18 person, may be found to have assaulted such person.

19 The jury may infer that a gun used during a  
20 robbery was loaded in the absence of direct proof  
21 that the chambers contained bullets.

22 A "dangerous weapon" includes anything  
23 capable of being readily operated, manipulated,  
24 wielded, or otherwise used by one or more persons  
25 to inflict severe bodily harm or injury upon another

1  
2 person. So, an operable firearm, such as a pistol,  
3 revolver, or other "gun," capable of firing a bullet  
4 or other "ammunition," may be found to be a dangerous  
5 weapon or device.

6 To "put in jeopardy the life" of a person  
7 "by the use of a dangerous weapon," means, then, to  
8 expose such person to a risk of death, or to the  
9 fear of death, by the use of such dangerous weapon.

10 Both counts of the indictment also charge the  
11 defendants with being an aider and abettor.

12 In order to aid and abet another to commit a  
13 crime it is necessary that an accused willfully  
14 associate himself in some way with the criminal  
15 venture, and willfully participate in it as he would  
16 in something he wishes to bring about; that is to  
17 say, that he willfully seeks by some act or omission  
18 of his to make the criminal venture succeed.

19 An act or omission is "willfully" done, if  
20 done voluntarily and intentionally and with the  
21 specific intent to do something the law forbids, or  
22 with the specific intent to fail to do something the  
23 law requires to be done; that is to say, with bad  
24 purpose either to disobey or to disregard the law.

25 You, of course, may not find a defendant guilty

1  
2 unless you find beyond a reasonable doubt that every  
3 element of the offense as defined in these  
4 instructions was committed by some personal persons,  
5 and that the defendant participated in its commission.

6 The charges in this indictment require the  
7 Government to prove that each of the defendants  
8 knowingly and willfully performed acts in violation  
9 of law. The Court will therefore define the words  
10 "knowingly" and "willfully."

11 An act is done "knowingly" if done voluntarily  
12 and intentionally, and not because of mistake or  
13 accident or other innocent reason.

14 The purpose of adding the word "knowingly,"  
15 was to insure that no one would be convicted for an  
16 act done because of mistake or accident or other  
17 innocent reason.

18 An act is done "willfully" if done voluntarily  
19 and intentionally, and with specific intent to do  
20 something the law forbids; that is to say, with bad  
21 purpose either to disobey or to disregard the law.

22 The evidence in this case raises the question  
23 of whether the defendant was in fact the criminal  
24 actor and necessitates your resolving any conflict  
25 or uncertainty in testimony on that issue.

1  
2 The burden of proof is on the prosecution  
3 with reference to every element of the crime charged  
4 and this burden includes the burden of proving  
5 beyond reasonable doubt the identity of the defendant  
6 as the perpetrator of the crime charged.

7 Identification may be made through the  
8 perception of any witness' senses. It is not  
9 essential that the witness himself be free from doubt  
10 as to the correctness of his opinion. You, as the  
11 jury, may treat the identification testimony as a  
12 statement of fact by the witness:

13 One, if the witness had an opportunity to  
14 observe the accused;

15 Two, if the witness is positive in his  
16 identification;

17 Three, if the witness' identification  
18 testimony is not weakened by prior failure to  
19 identify or by prior inconsistent identification; and

20 Four, if, after cross-examination, his  
21 testimony remains positive and unqualified.

22 In the absence of any one of these four  
23 conditions, however, the witness' testimony as to the  
24 identity must be received with caution and  
25 scrutinized with care.

1  
2 Mis-identification can occur as a result of  
3 honest error. Errors in photographic identification  
4 can occur, and such errors may affect a subsequent  
5 in-court identification. It is for you to  
6 determine, on the basis of all the evidence submitted  
7 on the issue of identification, whether or not there  
8 is a proper identification of each of the defendants  
9 and whether or not these defendants committed the  
10 crimes charged in the indictment.  
11

12 (continued next page)  
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## Charge A 26

EK:ss  
4PM4

1  
2 If it appears from the evidence in the case  
3 that a confession would not have been made, but for  
4 some threat of harm to the defendant or someone re-  
5 lated to him, or that it was the result of his  
6 custodial questioning at night, without sleep, such  
7 a confession should not be considered as having been  
8 voluntarily made. There is a danger that a person  
9 accused might be persuaded by the pressure of hope  
10 or fear to confess as facts things which are not true  
11 in an effort to avoid threatened harm or punishment  
12 to himself or his relations. If the evidence in the  
13 case leaves the jury with a reasonable doubt as to  
14 whether a confession was voluntarily made, then the  
15 jury should disregard it entirely.

16 Now, there are in any case, and in this one,  
17 two types of evidence from which a jury may properly  
18 find a defendant guilty of a crime, one is direct  
19 evidence such as testimony of an eye witness, the  
20 other is circumstantial evidence which is proof of a  
21 chain of facts and circumstances pointing to the  
22 commission of the offense.

23 As a general rule, the law makes no distinction  
24 between direct and circumstantial evidence, but simply  
25 requires that before convicting a defendant the jury

## Charge

A 27

1  
2 must be satisfied of the defendant's guilt beyond a  
3 reasonable doubt from all the evidence in the case.

4 I will define for you a little later on what  
5 is meant by "beyond a reasonable doubt."

6 A defendant is presumed innocent of the crime.  
7 Thus the defendant, although accused, begins the trial  
8 with a clean slate and with no evidence against him,  
9 and the law permits nothing but legal evidence to be  
10 presented before a jury to be considered in support of  
11 any charge against the accused, so that the presumption  
12 of innocence alone is sufficient to acquit a defendant  
13 unless you, the jury, are satisfied beyond a reasonable  
14 doubt of the defendant's guilt after careful and im-  
15 partial consideration of all the evidence in the case.

16 It is not required that the government prove  
17 guilt beyond all possible doubt. The test is one of  
18 reasonable doubt, and reasonable doubt is doubt based  
19 upon reason and common sense, the kind of doubt that  
20 would make a reasonable person hesitate to act. Proof  
21 beyond a reasonable doubt must, therefore, be proof of  
22 such a convincing character that you would be willing  
23 to rely and act upon it unhesitatingly in the most  
24 important of your own affairs.

25 You, the jury, will remember that a defendant

Charge

A 28

1  
2 is never to be convicted on mere suspicion or con-  
3 jecture. The burden is always upon the prosecution to  
4 prove guilt beyond a reasonable doubt. This burden  
5 never shifts to a defendant. The law never imposes  
6 upon a defendant in a criminal case the burden or duty  
7 of calling any witnesses or producing any evidence.

8 A reasonable doubt exists whenever, after  
9 careful and impartial consideration of all the evidence  
10 in the case, the jurors do not feel convinced to a  
11 moral certainty that a defendant is guilty of the  
12 charge. So, if the jury views the evidence in the  
13 case as reasonable permitting either of two conclusions,  
14 one of innocence, the other of guilt, you, the jury,  
15 should, of course, adopt the conclusion of innocence.

16 I have said that the defendant may be proven  
17 guilty either by direct or circumstantial evidence.  
18 I have said that direct evidence is the testimony of  
19 one who asserts actual knowledge of a fact, such as  
20 an eye witness. Also circumstantial evidence is proof  
21 of a chain of facts and circumstances indicating the  
22 guilt or innocence of a defendant. You, the jury,  
23 may make common sense inferences from the proof and  
24 facts.

25 It is not necessary that all inferences drawn

Charge

A 29

1  
2 from the facts in evidence be consistent only with  
3 guilt and inconsistent with every reasonable hypothesis  
4 of innocence or that there must be no reasonable doubt  
5 as to each chain of proof. The test is one of  
6 reasonable doubt, and should be based upon all the  
7 evidence, the testimony of the witnesses, the docu-  
8 ments offered into evidence and the reasonable in-  
9 ferences which can be drawn from the proven facts.

10 An inference is a deduction or conclusion which  
11 reason and common sense leave the jury to draw from  
12 the facts which have been proved. You are to consider  
13 only the evidence in the case. But in your considera-  
14 tion of the evidence you are not limited to the bald  
15 statements of the witnesses. On the contrary, you  
16 are permitted to draw, from the facts that you find  
17 have been proved, such reasonable inferences as seem  
18 justified in the light of your own experience.

19 As I stated before, the law never imposes upon  
20 a defendant in a criminal case the burden or duty  
21 of calling any witnesses or producing any evidence.

22 The crimes charged in this case are serious  
23 crimes which require proof of specific intent before  
24 a defendant can be convicted. Specific intent, as the  
25 term implies, means more than the general intent to

## Charge

A 30

1  
2 commit the act. To establish specific intent, the  
3 government must prove that a defendant knowingly did  
4 an act which the law forbids, purposely intending to  
5 violate the law. Such intent may be determined from  
6 all the facts and circumstances surrounding the case.

7 Intent ordinarily may not be proved directly,  
8 because there is no way of fathoming or scrutinizing  
9 the operations of the human mind. But you may infer  
10 the defendant's intent from the surrounding circum-  
11 stances. You may consider any statements made and  
12 acts done by a defendant and all other facts and  
13 circumstances in evidence which indicate his state  
14 of mind. It is ordinarily reasonable to infer that  
15 a person intends the natural and probable consequences  
16 of acts knowingly done or knowingly omitted.

17 The law does not compel a defendant in a  
18 criminal case to take the witness stand and testify,  
19 and no presumption of guilt may be raised, and no  
20 inference of any kind may be drawn, from the failure  
21 of a defendant to testify.

22 As stated before, the law never imposes upon  
23 a defendant in a criminal case the burden or duty  
24 of calling any witnesses or producing any evidence.

25 You as jurors are the sole judges of the

## Charge

## A 31

credibility of the witnesses and the weight their testimony deserves, and it goes without saying that you should scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and his demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; an innocent misrecollection, like failure of recollection, is not an uncommon experience.

## Charge

A 32

1  
2 In weighing the effect of a discrepancy, always  
3 consider whether it pertains to a matter of importance  
4 or an unimportant detail, and whether the discrepancy  
5 results from innocent error or intentional falsehood.

6 After making your own judgment, you will give  
7 the testimony of each witness such credibility, if  
8 any, as you may think it deserves. Another test that  
9 you can use in determining the truthfulness or  
10 credibility of a witness is to use your own good  
11 common sense in addition to these essentials that I  
12 have given you. You can use your good common sense  
13 as you do in your every day experience where you must  
14 make important decisions based upon what others tell  
15 you. When you decide to either accept or ignore the  
16 statements of others you use your common sense. Your  
17 good judgment will say to you somehow or other that  
18 whatever they say does not appear to be truthful,  
19 that somehow or other you just do not believe what  
20 they have said. That is your ability to reason, your  
21 ability to determine the truthfulness of the person  
22 you are speaking with. Likewise, your common sense  
23 should be used to determine the weight to be given  
24 the testimony of a witness.

25 You take that same good common sense into the

## Charge

A 33

1 jury room, you do not leave it outside. In addition  
2 to what I have said, use your common sense as a  
3 test in exercising your good judgment and in deter-  
4 mining whether or not this defendant is guilty of the  
5 crime charged. It is for you to determine whether  
6 the witnesses in this case have testified truthfully,  
7 whether or not they have an interest in the case, what  
8 that interest may be and how great it is and whether  
9 or not they have told you falsehoods. This is all  
10 for you to determine.  
11

12 (Continued on next page.)

13 4/5 next3

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1  
2 Every witness' testimony must be weighed as  
3 to its truthfulness. If you find any witness lied  
4 as to any material fact in the case, then the law  
5 gives you certain privileges. One of those  
6 privileges is that you have the right to disregard  
7 the entire testimony of that witness. If you find,  
8 however, that you can sift through that testimony and  
9 determine which of the testimony is true and which  
10 was false, then the law allows you to take the  
11 portions which were true and weigh them, and  
12 disregard those portions which were false. That  
13 again is within your prerogative.

14 The weight of the evidence is not necessarily  
15 determined by the number of witnesses testifying  
16 on either side. You should consider all the facts  
17 and circumstances in evidence to determine which of  
18 the witnesses are worthy of greater credence. You  
19 may find that the testimony of a smaller number of  
20 witnesses on one side is more credible than the  
21 testimony of a greater number of witnesses on the  
22 other side.

23 You are not obliged to accept testimony, even  
24 though the testimony is uncontradicted and the  
25 witness is not impeached. You may decide, because of

1  
2 the witness' bearing or demeanor, or because of the  
3 inherent improbability of his testimony, or for other  
4 reasons sufficient to you, that such testimony is not  
5 worthy of belief.

6 The Government is not required to prove the  
7 essential elements of the offense as defined in  
8 these instructions by any particular number of  
9 witnesses. The testimony of a single witness may be  
10 sufficient to convince you beyond a reasonable  
11 doubt of the existence of an essential element of the  
12 offense charged, if you believe beyond a reasonable  
13 doubt that the witness is telling the truth.

14 An accomplice is one who unites with another  
15 person in the commission of a crime, voluntarily  
16 and with common intent. An accomplice does not  
17 become incompetent as a witness because of  
18 participation in the crime charged. On the contrary,  
19 the testimony of an accomplice alone, if believed  
20 by the jury, may be of sufficient weight to sustain  
21 a verdict of guilty, even though not corroborated or  
22 supported by other evidence.

23 However, the jury should keep in mind that  
24 such testimony is always to be received with caution  
25 and weighed with great care.

1  
2           Where a witness is available to both parties,  
3 no unfavorable inference may be drawn as to either  
4 party for the failure to call that witness, but you,  
5 the jury, must keep in mind that the law never  
6 imposes upon a defendant in a criminal case the  
7 burden or duty of calling any witnesses or producing  
8 any evidence.

9           The rules of evidence ordinarily do not  
10 permit witnesses to testify as to opinions or  
11 conclusions. An exception to this rule exists as to  
12 those whom we call "expert witnesses."

13           Witnesses who, by education and experience,  
14 have become expert in some art, science, profession,  
15 or calling, may state an opinion as to relevant and  
16 material matter, in which they profess to be expert,  
17 and they also state their reasons for the opinion.

18           You should consider each expert opinion  
19 received in evidence in this case, and give it such  
20 weight as you think it deserves. If you should  
21 decide that the opinion of an expert witness is not  
22 based upon sufficient education and experience, or  
23 if you should conclude that the reasons given in  
24 support of the opinion are not sound, or that the  
25 opinion is outweighed by other evidence, you may

1  
2 disregard the opinion entirely.

3       There is nothing peculiarly different in the  
4 way a jury should consider the evidence in a criminal  
5 case from that in which all reasonable persons treat  
6 any question depending upon evidence presented to them.  
7 You are expected to use your good common sense;  
8 consider the evidence in the case for only those  
9 purposes for which it has been submitted, and give it  
10 a reasonable and fair construction, in the light of  
11 your common knowledge of the natural tendencies and  
12 inclinations of human beings.

13       If an accused be proved guilty beyond a  
14 reasonable doubt, say so. If not so proved guilty,  
15 say so.

16       Keep constantly in mind that it would be a  
17 violation of your sworn duty to base a verdict of  
18 guilty upon anything other than the evidence in the  
19 case; and remember as well that the law never imposes  
20 upon a defendant in a criminal case the burden or  
21 duty of calling any witnesses or producing any  
22 evidence.

23       It is your duty to give separate, personal  
24 consideration to the case of each individual  
25 defendant. When you do so, you should analyze what

1  
2 the evidence in the case shows with respect to that  
3 individual, leaving out of consideration entirely  
4 any evidence admitted solely against some other  
5 defendant or defendants. Each defendant is entitled  
6 to have his case determined from evidence as to his  
7 own acts and statements and conduct, and any other  
8 evidence in the case which may be applicable to him.

9 You are here to determine the guilt or  
10 innocence of the accused from the evidence in the case.  
11 You are not called upon to return a verdict as to the  
12 guilt or innocence of any other person or persons.  
13 So, if the evidence in the case convinces you beyond  
14 reasonable doubt of the guilt of the accused, you  
15 should so find, even though you may believe one or  
16 more other persons are also guilty.

17 But if any reasonable doubt remains in your  
18 mind after impartial consideration of all the evidence  
19 in the case, it is your duty to find the accused not  
20 guilty.

21 If any reference by the Court or by counsel to  
22 matters of evidence does not coincide with your own  
23 recollection, it is your recollection which should  
24 control during your deliberations.

25 The punishment provided by law for the

1 offenses charged in the indictment is a matter  
2 exclusively within the province of the Court, and  
3 should never be considered by the jury in any way,  
4 in arriving at an impartial verdict as to the guilt  
5 or innocence of the accused.  
6

7 A separate crime or offense is charged  
8 against each of the defendants in each count of the  
9 indictment. Each offense, and the evidence  
10 pertaining to it, should be considered separately.  
11 The fact that you may find one of the accused guilty  
12 or not guilty of one of the offenses charged should  
13 not control your verdict as to any other offense  
14 charged against the other defendant.

15 Now, in this type of case, there must be a  
16 unanimous verdict, that means all twelve of you must  
17 agree, and it goes without saying, as I said in my  
18 pre-charge, that it becomes incumbent upon you to  
19 listen to one another and to argue out the points  
20 among yourselves in order to determine in good  
21 conscience whether your fellow jurors' argument is  
22 one commensurate with yours or whether at least you  
23 can with good conscience agree with him. You have  
24 no right to stubbornly and idly sit by and say,  
25 "I am not talking to anyone," "I am not going to

1  
2 discuss it," because people with common sense and  
3 the ability to reason must communicate, they must  
4 communicate their thoughts. So anything which  
5 appears in the record and about which one of you may  
6 not agree, talk it out amongst yourselves and then  
7 if you can't agree as to what is in the record, well,  
8 you can ask the Court to have that portion of the  
9 testimony read back to you.

10 You may do so by knocking on the door and  
11 giving a note in writing to the Clerk who will then  
12 present it to the Court, and I will then bring you  
13 into the courtroom.

14 Madam Forelady, you will preside over the  
15 deliberations, and you will be the spokesman here  
16 in court.

17 Your verdict must be unanimous. That means  
18 that the twelve of you must agree.

19 The form of your verdict will be as follows:

20 If you should find that both defendants are  
21 guilty of both counts in the indictment, you will  
22 then say:

23 We the jury find both defendants, Mr. Boston  
24 and Mr. Moore, guilty as to Count 1 and Count 2.

25 If you should find one defendant guilty as

1  
2 to both counts, you would announce:

3 We, the jury, find Mr. Boston or Mr. Moore,  
4 whichever one it would be, guilty of Count 1 and  
5 guilty of Count 2.

6 If you should find one of the defendants  
7 guilty as to one count and the other defendant  
8 guilty as to the other count, the form of your  
9 verdict will be:

10 We find the defendant Boston guilty of either  
11 Count 1 or 2, and we find the defendant Moore guilty  
12 of either Count 1 or 2.

13 If you should find either defendant not  
14 guilty as to one count, you will announce that you  
15 find Mr. Boston or Mr. Moore not guilty as to that  
16 count, either Count 1 or 2, that is either one  
17 defendant or the other defendant.

18 Of course, if you find the defendants not  
19 guilty as to both counts, then the form of your  
20 verdict will be:

21 We, the jury, find the defendants not guilty,  
22 and that will cover both counts.

23 Now that is the Court's charge.

24 You will excuse me for just one minute now.  
25

1 I have to discuss certain matters with the counsel.

2 (The following occurred side bar without the  
3 hearing of the jury.)  
4

5 MR. MC CARTHY: I would just note for the  
6 record the request and statements made before your  
7 Honor's charge.

8 THE COURT: Yes?

9 MR. MC CARTHY: There was just one further  
10 thing on the question of the involuntary confession,  
11 I would ask your Honor to charge that if you believe  
12 the defendant made a confession because of possible  
13 harm to another, then that confession also would be  
14 involuntary.

15 THE COURT: It is in my charge. It is in  
16 there.

17 MR. WEISS: It is in there.

18 THE COURT: That was clearly stated in the  
19 charge. It is clearly stated in the charge.

20 Anything else?

21 MR. BEHAR: I have no exceptions.

22 MR. WEISS: Mr. McCarthy and I have agreed to  
23 join in one exception.

24 MR. MC CARTHY: We have the exception.

25 MR. WEISS: We have agreed to have one

1  
2 exception.

3 THE COURT: Anything by the Government?

4 MR. BEHAR: Nothing by the Government, your  
5 Honor.

6 THE COURT: All right.

7 (The trial then proceeded within the hearing  
8 of the jury.)

9 THE COURT: Now, that part of the proceedings  
10 likewise has been completed.

11 I am going to now have you go out to lunch,  
12 and the two alternates, if you wish to go, you may  
13 go.

14 I suggest at this point likewise that you do  
15 not discuss this case on the way to lunch or at  
16 lunch or on the way back.

17 Keep an absolutely open mind until you get  
18 into the deliberating room where you must deliberate  
19 on the issues in the case.

20 The alternates after lunch will then be  
21 discharged, right from the restaurant.

22 Is that agreeable with you?

23 ALTERNATE JUROR NO. 1: Yes.

24 ALTERNATE JUROR NO. 2: Yes.

25 THE COURT: All right.